

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of DRE ELIJAH THOMAS and
ANNA MARIE NORWOOD, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

VERNICE CHEENE THOMAS,

Respondent-Appellant,

and

DARYL ANTHONY NORWOOD,

Respondent.

UNPUBLISHED

September 14, 2004

No. 254235

Saginaw Circuit Court

Family Division

LC No. 02-027912-NA

Before: Whitbeck, C.J., and Sawyer and Saad, JJ.

PER CURIAM.

I. Overview

Respondent-appellant Vernice Thomas appeals as of right from the trial court order terminating her parental rights to the two minor children under MCL 712A.19b(3)(c)(i), (g) and (j). We affirm.

II. Basic Facts And Procedural History

The record reflects that Thomas's mental illness and involvement with Saginaw County Community Mental Health date to at least 1995. Separate petitions were filed in Saginaw Probate Court in 1998 and 2000 requesting Thomas's involuntary hospitalization because of her mental illness. The children lived in Chicago with a relative during the 1998 hospitalization, and returned to Thomas in March 1999. During subsequent hospitalizations, Thomas had a care plan under which the children stayed with relatives or her boyfriend.

This proceeding commenced when a petition was filed on July 10, 2002 requesting Thomas's hospitalization because she was exhibiting psychotic behavior after acquaintances took her medication away from her, presumably in order to sell the medication on the street. Thomas was hospitalized at Bay Medical for approximately one month, and then improperly discharged

to the care of her brother, Eric Thomas, on August 5, 2002 rather than wait for a bed to become available for her at Caro Regional Center. Thomas appeared at the Covenant Hospital emergency room with the children on August 7, 2002, requesting that the children be examined for sexual abuse, and stating that one child was having a nervous breakdown. The children were polite and well behaved, but visibly hungry, nervous, afraid, and concerned about Thomas.

It was apparent to hospital personnel that the child was not having a nervous breakdown, but that Thomas was mentally ill and could not care for the children. Hospital social worker Karen Gaffney tried to obtain information from Thomas regarding who could care for the children, but Thomas was unable to focus, disorganized, and could give Gaffney only incomplete telephone numbers and a single name, "Gracie." Gaffney checked the hospital's file on Thomas and found a telephone number, but the person who answered told her that Gracie was a teenaged friend of the family who was not able to serve as a legal caretaker for the children. The person at that telephone number was not a relative and did not have any contact numbers for relatives. Gaffney contacted protective services after it became apparent that Thomas would be transferred to a psychiatric unit and there was no available caretaker for the children.

The children were placed in foster care on August 8, 2002. When Thomas was later transferred to the Caro Regional Center in Tuscola County, she still did not have a care plan in place for the children. Community Mental Health recommended adult foster care for Thomas in the future because she would always need close supervision to maintain her medication and properly care for herself.

A petition was filed on August 26, 2002 requesting termination of Thomas's parental rights, but not those of Daryl Norwood. Daryl Norwood appeared at the August 8, 2002 preliminary hearing, but thereafter did not maintain consistent contact with his attorney, and his whereabouts were unknown at times. His parental rights were later terminated, but he is not a party to this appeal.

The adjudication trial/termination hearing was initially scheduled for October 31, 2002, but due to difficulty serving Thomas, it was postponed until December 12, 2002. The trial court assumed jurisdiction over the children at the close of the trial on December 13, 2002, finding true the allegations in the petition regarding Thomas's past and continuing mental illness, sexual molestation by Eric Thomas as recently as August 6, 2002, and Thomas's failure to protect the children from Eric Thomas. Counsel for Thomas requested visits or phone contact between Thomas and the children. The trial court considered the request to be reasonable, but noted its concern for the emotional state of the children if they spoke to Thomas and become fearful about what was or was not happening to her. The trial court stated that it would not mandate contact, but would leave it up to the agency to evaluate how contact might happen. The guardian ad litem strongly objected to physical or telephone visits, but expressed willingness to discuss it with the agency.

The initial disposition was adjourned to January 24, 2003. According to the case service plan, Thomas was required to address emotional stability and sexual abuse during her stay at the Caro Regional Center, but that parenting skills, employment, and housing issues would be dealt with later to avoid overwhelming Thomas. Telephone contact between Thomas and the children was again discussed, and it was noted that Ann Clynick approved telephone visits supervised by the staff at the Center, and they were being arranged by the caseworker. The trial court ordered

compliance with the case service plan, and stated that it was allowing the agency flexibility to permit the type of visits that would be beneficial to Thomas and the children.

At a May 19, 2003 review hearing, the trial court noted that the current permanency plan was to return the children to Thomas or a relative, but if that could not be accomplished, or at least a “good projection” toward it could not be accomplished by the time of the permanency planning hearing, the alternative would be termination of parental rights. The permanency planning hearing was held on August 21, 2003. Thomas had been released from the Caro Regional Center approximately one month earlier and placed in an adult foster home. Because Thomas would not be in a position to resume parenting the children for an undetermined amount of time, the agency stated that termination of parental rights was its goal. The guardian ad litem argued that it was obvious that Thomas would never be able to parent the children, that all visits should be cut off, and the petition for termination accelerated.

The trial court found that progress had not been made toward returning the children to Thomas although she had shown progress in her own personal mental health treatment, and that state statute mandated that it order the agency to file a termination petition unless it was clearly not in the children’s best interests to do so. The trial court left the issue of visitation to the children’s therapist to determine, even after the termination petition was filed, and noted that visitation must be based on the needs of the children and not the desire of Thomas.

The agency filed a termination petition on October 6, 2003, alleging Thomas’s continued inability to care for the children and her uncertain release date from adult foster care. The termination hearing was held on January 6, 2004. At the conclusion of the hearing, the trial court concluded that clear and convincing evidence supported termination of Thomas’s parental rights under MCL 712A.19b(3)(c)(i), (g) and (j), and 19b(5). The order terminating Thomas’s parental rights was entered on January 9, 2004. It is from this order that she appeals.

III. Parenting Time

A. Standard Of Review

Thomas argues that the trial court erred in not ordering and enforcing weekly parenting time for her pursuant to MCL 712A.18f(3)(E) and MCL 712A.13a(11). Thomas frames this issue both as a violation of statute, which is a question of law, and as a demonstration that the agency did not make reasonable efforts to reunify the family, which is a question of fact. We review the trial court’s conclusions of law *de novo*.¹ We review factual findings in child protective proceedings for clear error.² A finding is clearly erroneous if, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake has been made.³

¹ *Maxwell v Citizens Ins Co of America*, 245 Mich App 477, 480-481; 628 NW2d 95 (2001).

² MCR 3.977(J); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

³ *Id.*

B. MCL 712A.18f(3)(e)

Regular and frequent visits of at least every seven days are statutorily mandated once a child is removed from a parent under MCL 712A.18f(3)(e). An exception to this mandate occurs when visitation would be harmful to the children under a determination made in a psychological evaluation or counseling pursuant to MCL 712A.13a(11), or otherwise.

Here, the evidence showed that Thomas vigorously pursued her statutory right to visit, and that she would not intentionally harm the children physically. Thus, the determinative issue was whether visitation would cause the children emotional harm. The trial court was asked repeatedly to order physical visits, but left the issue of visitation to the discretion of the agency and the children's therapists and kept abreast of the status of visitation at each hearing. Physical visits were inappropriate at the home for the mentally ill in which Thomas resided, but caseworkers arranged biweekly telephone visits. Thomas did not object on the record to biweekly instead of weekly telephone visits. When Thomas received weekend passes, no one was available to supervise visits on weekends. Thomas moved to adult foster care just one month before the permanency planning hearing, at which time the parties had to consider the emotional effect on the children of resuming physical contact with Thomas when termination was possible.

A complete review of the record does not leave this Court with a definite and firm conviction that the trial court made a mistake in failing to order more frequent visits between Thomas and the children. The statute mandates visits "unless parenting time, even if supervised, would be harmful to the child as determined by the court under section 13a of this chapter or otherwise." The trial court was correct in deferring to the therapists who had performed the children's psychological evaluations and provided counseling, and Thomas's caseworkers and caretakers, in scheduling appropriate visits, and in not imposing an order that would have been impossible to comply with, or detrimental to Thomas or the children.

IV. Due Process

A. Standard Of Review

Thomas argues that her right to due process was violated and that she was denied fundamental fairness by the agency's lack of effort to reunify the family, failure to consider relatives as caretakers for the children, denial of visits, and improper comparison of the foster home with her home. We review constitutional issues de novo.⁴

B. Balancing The Interests

In determining whether due process rights were violated, we must balance the respondent-appellant's interest, the governmental interest, and the risk of error created by the state's chosen procedure.⁵ In this case, Thomas's interest was the constitutional right to raise her

⁴ *Kampf v Kampf*, 237 Mich App 377, 381; 603 NW2d 295 (1999).

⁵ *Santowsky v Kramer*, 455 US 745, 754; 101 S Ct 1388; 71 L Ed 2d 599 (1982).

children. The countervailing governmental interest was the goal of the Juvenile Code to ensure that “each juvenile coming within the court’s jurisdiction receives the care, guidance, and control, preferably in his or her own home, conducive to the juvenile’s welfare and the best interest of the state.”⁶ The risk of error in the state’s procedure was the danger of terminating Thomas’s parental rights without providing her the benefit of the agency’s attempts at reunification or allowing the children to reside with relatives under an arrangement less final than termination of parental rights.

The evidence showed that the agency provided reunification services to the children’s father, the children, and to Thomas. Thomas received treatment, therapy, and medication at Caro Regional Center, and the agency was not required to duplicate those services. Thomas was emotionally unprepared to engage in other services such as parenting classes or employment and housing searches. A one-week delay in providing a case service plan, and a subsequent delay in a review hearing for lack of a caseworker, did not constitute failure to strive for reunification. The caseworker’s failure to locate an adult foster care home in which the children could reside with Thomas was not a failure to provide services when testimony showed that such homes were very rare and difficult to find, and that one was located by Thomas’s CMH caseworker just before the termination hearing. Visits were provided as considered appropriate to the children’s well being by the children’s therapists and Thomas’s caretakers and caseworkers. An interstate home study was performed to seek relatives who could assume care of the children, but no relatives were considered available or suitable. While it appeared that Renee Moore might serve as a relative placement for the children, counsel for Thomas did not further pursue an inquiry regarding her on the record after the caseworker indicated that Renee Moore was not a possibility.

Finally, the trial court stated on the record that it did not consider the relative merits of the children’s foster home and Thomas’s residence in adult foster care in deciding whether the statutory grounds for termination had been met, but only in determining the children’s best interests. The evidence showed that no improper comparison was made.

Thomas’s attorney and her CMH caseworker advocated vigorously for her, but there were valid reasons why frequent physical visits, placement with relatives, or placement of the children with Thomas in an adult foster home did not come to fruition. We conclude that Thomas’s parental rights were terminated in accord with due process and fundamental fairness.

V. Clear And Convincing Evidence

A. Standard Of Review

Thomas contends that the trial court erred in finding that MCL 712A.19b(3)(c)(i) and (3)(g) were proven by clear and convincing evidence. In order to terminate parental rights, the trial court must find that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met by clear and convincing evidence.⁷ We review the trial court’s

⁶ MCL 712A.1(3).

⁷ *In re McIntyre*, 192 Mich App 47, 50; 480 NW2d 293 (1993).

findings of fact under the clearly erroneous standard.⁸ A finding is clearly erroneous if, although there is evidence to support it, the reviewing court on the entire record is left with a definite and firm conviction that a mistake has been made.⁹ Regard is given to the special ability of the trial court to judge the credibility of the witnesses who appeared before it.¹⁰

B. The Evidence

We conclude that the trial court did not clearly err in determining that the statutory grounds for termination of parental rights were established by clear and convincing evidence. Thomas had a history of mental illness that required frequent hospitalizations. Although Thomas previously had a care plan for the children during her hospitalizations, when these proceedings began she had no suitable caretaker for the children, and that condition was not rectified during the seventeen-month course of these proceedings. Relatives were investigated for placement, but none were suitable or available at the time of the termination hearing. There was no reasonable likelihood that the children's lack of proper custody would be rectified within a reasonable time.

The evidence at the termination hearing showed that Thomas needed constant care and supervision, was unable to provide proper care and custody for the children, and had never been able to provide proper care for them without assistance. Evidence indicated that since 1995, Thomas was unable to care for the children properly even though she received hands-on, in-home services from Saginaw Community Mental Health, and housing and financial support from others. Her caseworker could not tell when, or if, Thomas might stabilize emotionally, and the evidence showed that she had not stabilized over the past seven years. Therefore, there was no reasonable likelihood that Thomas would be able to provide proper care or custody for the children within a reasonable time.

While there was no evidence that Thomas would intentionally harm her children, there was likelihood of harm to the children if they were returned to her because others had harmed them in the past while in her care, and her condition had not changed during the course of the proceedings. More importantly, the children would be harmed by the instability created by Thomas's recurring psychological difficulties and continual moves from placement to placement.

Affirmed.

/s/ William C. Whitbeck

/s/ David H. Sawyer

/s/ Henry William Saad

⁸ MCR 3.977(J); *Miller, supra* at 337.

⁹ *Id.*

¹⁰ *Id.*